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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,)	
)	2:04-cr-262-JCM-PAL
Plaintiff,)	
)	
vs.)	GOVERNMENT'S SUPPLEMENTAL
)	APPLICATION FOR ORDER DEEMING
)	ATTORNEY CLIENT
)	PRIVILEGE WAIVED
DAVID KENT FITCH,)	
)	
)	
Defendant.)	
)	

The United States of America, by and through DANIEL G. BOGDEN, United States Attorney, and CAMILLE W. DAMM, Assistant United States Attorney, respectfully requests that this Court enter an order waiving the attorney-client privilege in 2:04-cr-262-JCM with regard to David R. Johnson, Esq.

This order is sought for the following reasons:

1 1. The defendant, DAVID KENT FITCH, has filed a motion pursuant to 28
2 U.S.C. § 2255 to vacate, set aside or correct sentence by a person in federal custody in the
3 above-captioned case. *See* Doc. # 319. Defendant's motion alleges a denial of effective
4 assistance of counsel through all stages of the trial and appellate proceedings. This Court
5 previously entered an order on government motion that the attorney client privilege was waived as
6 to former trial counsel, Lisa Rasmussen, and appellate counsel, Mario Valencia.
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8 2. Ms. Rasmussen has notified the undersigned that David R. Johnson, Esq. also
9 represented Fitch during pretrial and trial proceedings. She advises that Mr. Johnson was present
10 at out-of-court and court proceedings and has relevant information regarding the issues. As such,
11 access to information from Mr. Johnson is also necessary in order to appropriately respond to the
12 allegations contained in defendant's § 2255 motion.
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14 3. The government requests that this Court also issue an order wherein the
15 attorney-client privilege in the above-captioned case is deemed waived for the purposes of this
16 proceeding as to what, if any, discussions Defendant had with Mr. Johnson with respect to the
17 issues raised in the § 2255 motion, and that all materials and information related to the issues be
18 ordered divulged to the government.
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20 4. The voluntary disclosure by Defendant of privileged attorney communications
21 and his complaints regarding Ms. Rasmussen and Mr. Valencia constitute a waiver of the privilege
22 as to all other such communications on the same subject. *Weil v. Investment/Indicators,*
23 *Research & Management*, 647 F.2d 18, 24 (9th Cir. 1981); *Clady v. County of Los Angeles*, 770
24 F.2d 1421, 1433 (9th Cir. 1985).
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1 Even when a party does not explicitly disclose the content of an attorney-client
2 communication, he may waive the privilege implicitly. A person cannot
3 always claim that he relied on counsel, while protecting what was said between
4 them from disclosure. As we have said, "The privilege which protects
attorney-client communications may not be used both as a sword and a shield.
Where a party raises a claim which in fairness requires disclosure of the
protected communication, the privilege may be implicitly waived." (citations
omitted).

5 *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997).

6 **WHEREFORE**, based on the foregoing, the government respectfully requests that the
7 attorney-client privilege in 2:04-cr-262-JCM be deemed waived as David R. Johnson, with respect
8 to all matters and issues relating to the § 2255 motion; and that Mr. Johnson provide the
9 government with an affidavit, as well as all materials and information, addressing Defendant's
10 allegations of ineffective assistance of counsel within forty-five days of the Court's order.
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14 **DATED** this 8th day of January, 2014.
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17 Respectfully Submitted,

18 DANIEL G. BOGDEN
United States Attorney

19 /S/

20 CAMILLE DAMM
Assistant United States Attorney
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the United States Attorney for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on January 8, 2014, she served a copy of the attached Government's Supplemental Application For Order Deeming Attorney Client Privilege Waived via CM/ECF to all parties and via the United States Postal Service to the defendant at the following address:

David Kent Fitch
34775-048
CANAAN
U.S. PENITENTIARY
Inmate Mail/Parcels
P.O. Box 300
Waymart, PA 18472
PRO SE

/S/
Ellenrose Jarmolowich
Legal Assistant

ORDER

James C. Mahan
UNITED STATES DISTRICT JUDGE